Supreme Court, U.S.
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No. 00-408

IN THE

Supreme Court of the United States

PHILIP CONDON FISHER,

Petitioner,

v.

UNITED FEATURE SYNDICATE INC.
(a Scripps Howard Company), et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR
THE TENTH CIRCUIT.

PETITION FOR A WRIT OF CERTIORARI.

PHILIP CONDON FISHER
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5 7 P

QUESTIONS PRESENTED.

I. Whether the Court of Appeals erred in sanctioning a lower courts' rejection of petitioner's "one" established copyright claim, of a "last infringing act" and a "continuing wrong" adopted by the Seventh Circuit Court of Appeals; the same crucial issue; and a conflicting decision within the interpretations of 17 U.S.C. § 507(b)?

II. Whether the Court of Appeals erred in sanctioning a lower courts' dismissal of petitioner's copyright case, because they applied "dicta" not binding precedent; and refused to scrutinize his "side—by-side" comparison, to uncover "substantial and striking similarities," in his protected works and the accused works; a common procedure in copyright cases, accepted as relevant evidence in other lower courts?

III. Whether the Court of Appeals erred in sanctioning a lower courts' decision to deny the petitioner due process of law, an evidentiary hearing; and as stated in his Complaint, a " Demand For a Jury Trial and Statutory Damages"; a violation of the Seventh Amendment to the Constitution?

IV. Whether the Court of Appeals erred in sanctioning the lower courts' exclusion of petitioner's direct evidentiary facts (letters from the U. S. Copyright Office) of defendants' illegal publication of false copyright notices; punishable under 17 U.S.C. § 506. Criminal Offenses/18 U.S.C. § 2319?

V. Whether the Court of Appeals erred in sanctioning the lower courts' rejection of petitioners' direct proof of his "purposely misspelled legal words"; errors published in the defendant's 1974 production; the identical misspelled legal words copyrighted and registered in petitioner's original 1971 manuscript; that defendants accessed in 1972 and 1973?

PARTIES

DENVER PUBLISHING COMPANY; E.W. SCRIPPS COMPANY; CHARLES SCHULZ CREATIVE ASSOCIATES; LEE MENDELSON, Producer; BILL MELENDEZ; BARR ARTHUR PRODUCTIONS INC.; WHOLESALE WAREHOUSING OF CANADA; CBS, INC.; NEWS AMERICA PUBLISHING, INC.; KELLOGG COMPANY; METROPOLITAN LIFE INSURANCE COMPANY; CAPITAL CITIES/ ABC, INC.; TCI OF COLORADO; GENERAL ELECTRIC COMPANY; TURNER BROADCASTING SYSTEM INC.; UNIVERSAL PRESS SYNDICATE INC.; SEARS ROEBUCK AND CO.; MONTGOMERY WARD & COMPANY; KACEY FINE FURNITURE; SOUNDTRACK; FINGERHUT CORPORATION; BEST BUY COMPANY; TYSON FOODS INC.; WALT DISNEY COMPANY; ADVANCE PUBLICATIONS INC; S.I HOLDINGS INC.; THOMSON CONSUMER ELECTRONICS; and KARTES VIDEO COMMUNICATIONS; CYCLONE INCORPORATED; KING FEATURES SYNDICATE INC.; and COWLES SYNDICATE INC.; Respondents.

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ON PETITION FOR A WRIT OF CERTIORARI
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PETITION FOR A WRIT OF CERTIORARI.

Petitioner Philip C. Fisher respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW.

U.S. Tenth Circuit Court of Appeals, Feb 7, 2000, Case. No. 99—1162 (three judge panel) affirmed the United States District Courts' dismissal. See Appendix; and reported at 37 F. Supp. 2d 1213 (D. Colo. 1999) Fisher v. United Feature Syndicate, Inc.

JURISDICTION.

The judgement of the Court of Appeals was entered on February 7, 2000. This petition is filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. ~ 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

The United States Constitution.

Copyright Clause: (Art. I, § 8, cl. 8) provides:

> The Congress Shall have the Power: To promote the progress of science and useful arts by securing for limited times to authors and inventors the exclusive rights to their respective writings and discoveries.

17 U.S.C. §104. Subject matter of copyright: National origin. (a) UNPUBLISHED WORKS. — The works specified by sections 102 and 103, while unpublished, are subject to protection under this title without regard to the nationality or domicile of the author.

17 U.S.C. § 106(5) Exclusive Rights in copyrighted works, in relevant part, provides:

(5) "in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audio—visual work, to display the copyrighted work publicly."

17 U.S.C. § 506(a) Criminal Infringement. Any person who infringes a copyright willfully and for purposes of commercial advantage or private financial gain shall be

punished as provided in Section 2319 of Title 18.

17 U.S.C. § 506(c) False Copyright notice. Any person who, with fraudulent intent, places on any article a notice of copyright or words of the same purport that such person knows to be false, or who, with fraudulent intent, publicly distributes or imports for public distribution any article bearing such notice or words that such person knows to be false, shall be fined not more than $2,500.00.

17 U.S.C. § 507(b) CIVIL ACTIONS. — No civil action shall be maintained under the provisions of this title unless it is commenced within three years after the claim accrued. (The last infringing act" and a "continuing wrong"); adopted by the Seventh Circuit Court of Appeals.

Amendment to the United States Constitution:

ARTICLE VII.

Right of Trial by Jury.

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law.

All Courts of Appeals have unanimously held that: 17 U.S.C. § 504(c) is not susceptible of an interpretation that would avoid the Seventh Amendment question. See, e.g., Cass County Music Co. v C.H.L.R., Inc., 88 F.3d 635, 641 (CA8 1996); Video Views, Inc. v. Studio 21, Ltd., 925 F.2d 1010, 1014 (CA7 1991); Gnossos Music v. Mitken Inc., 653 F.2d 117,

119 (CA4 1981); see also Oboler v. Goldin, 714 F.2d 211, 213 (CA2 1983). 4 M. Nimmer & D. Nimmer, Nimmer on Copyright. § 14.04[C] 1997).

Federal Rules of Civil Procedure provides:

FRCP Rule 38 Jury Trial of Right, shall be preserved to the parties inviolate.

The United States LAW WEEK — 66 LW 4245 & 4247, April 7, 1998. SUPREME COURT OPINIONS

The Supreme Court decided:

JURY TRIAL — COPYRIGHTS — Damages

Seventh Amendment provides right to jury trial on all issues pertinent to award of statutory damages under Section 504(c) of Copyright Act, including the amount itself. Feltner v. Columbia Pictures Television Inc, US Sup Ct, No. 96—1768, 3/31/98. Arnstein v. Porter, 154 F.2d 464, 468 (CA2 1946) (copyright action for damages is "triable at 'law' and by a jury as of right"); Video Views, Inc. v. Studio 21, Ltd., 925 F. 2d 1010, 1014 (CA7 1991) ("little question that the right to a jury trial exists in a copyright infringement action when the copyright owner endeavors to prove and recover its actual damages"): 4, M. Nimmer & D. Nimmer, Nimmer on Copyright §12.10[B] (1997) ("beyond dispute that a plaintiff who seeks to recover actual damages is entitled to a jury trial").

DENYING PETITIONERS RELEVANT "SIDE-BY-SIDE" COMPARISON IS IN VIOLATION OF U.S.C. TITLE 28. APPENDIX - RULES OF EVIDENCE - ARTICLE IV. RELEVANCY AND ITS LIMITS - Rule 401 and Rule 402.

DEFINITION OF RELEVANT EVIDENCE.

28 U.S.C. APPENDIX—RULES OF EVIDENCE -
ARTICLE IV.
RELEVANCY AND ITS LIMITS Rule 401 & 402.

Rule 401. Definition of "Relevant Evidence."
"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Rule 402. Relevant Evidence Generally Admissible, Irrelevant Evidence Inadmissible. All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.

(Pub. L. 93—595, § 1, Jan. 2, 1975, 88 Stat. 1931.) NOTES OF ADVISORY COMMITTEE ON PROPOSED RULES.

The fact to be proved may be ultimate, intermediate or evidentiary; it matters not, so long as it is of consequence in the determination of the action.

All of petitioner's evidence using a "side-by-side" comparison, is "relevant evidence"; and pertains only to accurate similarities, between his accessed 1971 registered manuscript; and the defendant's later in time, 1974 production.

STATEMENT OF THE CASE.

This case involves a massive chain—conspiracy and constructive fraud, to cover-up for the main defendants. Because of these factors, there are many defendants and vicarious infringers. There are numerous erroneous findings and misapplications of law, sanctioned by the Court of Appeals; and they have disregarded normal judicial proceedings. Because of Rule 10, petitioner is not free to address these unscrupulous factors in this petition.

On April 24, 1972, Petitioner Fisher (then an Iowa resident.) personally entrusted his copyrighted and registered 1971 "CHIPPER," 18 Comic Strips and a 2,900 word Manuscript, to James L. Freeman, Managing Editor of (UFS) United Feature Syndicate Inc., New York City.

Around February 9, 1973, $9^{1}/_{2}$ months later, Fisher received a rejection letter from Freeman of United Feature Syndicate, saying "we won't be able to find a spot in our schedule for your "CHIPPER" (a 1971 humanized, cowardly, comic strip Sherlock Dog).

On February 1, 1974, United Feature Syndicate (UFS) released "It's A Mystery, Charlie Brown"; using the same plot, theme, story line, sequence of events and characterization; of Fisher's accessed 1971 "CHIPPER" feature. UFS applied a false 1958 copyright notice on a 1974 Snoopy, portraying a "humanized" Sherlock Dog; published in the Feb 1, 1974 issue of TV Guide.

Fisher compared his 1971 "CHIPPER" Manuscript with the 1974 "It's A Mystery, Charlie Brown" (IAMCB); and by using a "side-by-side" comparison, discovered 527 "substantial and striking similarities"; and in a later (IAMCB) publication, defendants copied his purposely misspelled legal words. Copying of errors coupled with proven access is primary evidence of infringement.

Fisher suspected defendants' were publishing false copyright notices; to pre—date his 1971 "CHIPPER" registrations; so Fisher requested a copyright search in Washington, D. C.; and received letters from the Copyright Office stating there were no separate 1958, 1962, 1986 or 1992 United Feature Syndicate Inc., copyright registrations, for Snoopy as a Sherlock Dog; only a 1974 registration for "It's A Mystery, Charlie Brown."

On August 12, 1996, Fisher filed suit for copyright infringement (within 3 year statute of limitations) in the United States District Court For The District Of Colorado. On June 4, 1997, recused Magistrate Judge Donald E. Abrams, issued his adverse Recommendation; and on June 23, 1997, Fisher filed his Timely Objection, and multitudinous Motions. Judge Walker D. Miller (Case No. 96- WM-1895) handled the case for nearly two years; and then defendants' counsel Baker & Hostetler, hired Judge Walker D. Miller's son as a counsel, creating a conflict of interest; and forcing Judge Miller to recuse himself.

On March 4, 1999 (having Case No. 96—D—1895 for 2

months) Judge Wiley Y. Daniel affirmed and adopted the Magistrate Judge's Recommendations to dismiss Fisher's case, with out an evidentiary hearing or a jury trial.

On April 5, 1999, Fisher filed a Notice of Appeal to the Tenth Circuit Court of Appeals. On August 10, 1999, Fisher filed a perceptive Reply Brief to appellees. On February 7, 2000, the United States Court of Appeals for the Tenth Circuit (Case No. 99—1162) three Judge Panel, Ebel, Kelley and Briscoe Circuit Judges; echoed (D.C. No. 96—D—1895) (D.Colo.) Judge Daniels' affirmation of recused Magistrate Abrams' dubious recommendations; and affirmed dismissal, without any of the Three Judge Panel signing their own Order and Judgement.

REASONS WHY THE WRIT SHOULD BE GRANTED.

This case presents substantial questions regarding an accessed unpublished copyright holders rights, to present his legitimate evidence to a jury, in a manner constitutional in other federal courts. These questions are: the Court of Appeals' rejection of petitioner's "last infringing act/a continuing wrong"; a "side— by—side" comparison of his protected works and the accused works; a "right to a jury trial"; proof of defendants' publication of "false copyright notices"; and the copying of petitioner's "errors," by accessed defendants; all procedures accepted and prosecuted in other lower courts.

I. THE COURT OF APPEALS ERRED IN SANCTIONING A LOWER COURTS' REJECTION OF PETITIONER'S "ONE" ESTABLISHED COPYRIGHT CLAIM, OF A "LAST INFRINGING ACT" AND A "CONTINUING WRONG" ADOPTED BY THE SEVENTH CIRCUIT COURT OF APPEALS.

I. The Tenth Circuit Court of Appeals erred in deciding the statute of limitations had expired on petitioner's 5th Claim of error; and they are in direct conflict with the Seventh Circuit Court of Appeals over interpretations of 17 U.S.C. § 507 (b). Petitioner's approved claim of a "last infringing act" and a "continuing wrong," is an adopted decision entered by the Seventh Circuit Court of Appeals, on the same crucial issue. See Taylor v. Merrick (1983, CA7 I11) 712 F.2d 1112. 219 USPQ 420; and Baxter v. Curtis Industries, Inc., (ND Ohio) 201 F Supp 100, 133 USPQ 78.

Fisher's registered 1975 "LANGSYNE" comic strip vs accessed Universal Press Syndicate's 1993 "FOR BETTER OR FOR WORSE" comic strip (petitioner's 5th Claim of error) is the only claim that is relevant to these Seventh Circuit cases.

II. THE COURT OF APPEALS ERRED IN REJECTING PETITIONERS' LEGITIMATE PRESENTATION OF AN ETHICAL "SIDE-BY-SIDE" COMPARISON; IN FAVOR OF ADOPTING THEIR PARTIAL "ABSTRACTION-FILTRATION-COMPARISON TEST"; THIS PARTIAL PROCEDURE CONFLICTS WITH OTHER COURTS' TOTAL PROCEDURES, FOR DISCOVERING SUBSTANTIAL AND STRIKING SIMILARITIES IN COPYRIGHT CASES.

Petitioner Fisher asserts that the Court of Appeal's three—judge panel decision below, conflicts with decisions by other lower courts; and that they erred in rejecting his "side—by-side" comparison, of his protected components and the accused works, to uncover substantial and striking similarities; an accepted and customary procedure in other United States courts.

The lower courts' decision in favor of a partial "abstraction— filtration—comparison test"; which the Court of Appeals alleges, "filters out the nonprotectable components of the product from the original expression," is a vague procedure, that conflicts with the legitimate review of admissible copyright evidence; a "dicta" procedure that is "particularly unintelligible"; notably an unfair procedure that denies petitioner a

jury trial; and a procedure that a jury would not understand.

Fair "side—by—side" comparisons were applied in the following "stare decisis" copyright cases: Cholvin v B. & F. Music Co. (CA7 I11) 253 F2d 102, 116 USPQ 491; Testa v Janssen (WD Pa) 492 F Supp 198, 208 USPQ 213; Stratchborneo v Arc Music Corp. (SD NY) 357 F Supp 1393, 179 USPQ 403. Arnstein v Porter (CA2 NY) 154 F2d 464, 68 USPQ 288 (disagreed with on other grounds) Sid & Marty Krofft Television Productions, Inc. v McDonald's Corp. (CA9 Cal) 562 F2d 1157, 196 USPQ 97); and as stated in, See v Durang (CA9 Cal) 711 F2d 141, 219 USPQ 771; Morse v Fields (DC NY) 127 F Supp 63, 104 USPQ 54. The Court of Appeals is also in conflict with the COPYRIGHT AND LITERARY PROPERTY LAWS - 18 Am Jur 2d § 210 and § 211 - (1985).

A RESOTUTELY ANALOGOUS SIDE BY SIDE COMPARISON CASE:

Detective Comics, Inc., v. Bruns Publications, Inc., et al. No. 203. Circuit. Court of Appeals-Second Circuit, April 29, 1940. 111 Fed 2d 432, 433, 434, AFFIRMED.

Superman vs. Wonderman. Pursuant to 111 F.2d 432, 433, 434. **2**. Copyrights. "Irrespective of the source from which an author of a work may derive the material which he uses, a picture or writing which is his own production cannot be copied." *ANALOGY:

(1) "Defendants, attempt to avoid the copyright by the "old argument"; that various attributes of "Sherlock Holmes" find prototypes or analogues among the heroes of literature and mythology. But, if the author of "CHIP-

> PER" has portrayed a humanized, talking, cowardly, Sherlock Holmes, Comic Strip Dog (Excerpt) but embodied an arrangement of incidents and literary expressions original with the author, they were the proper subjects of copyright and susceptible of infringement." Sheldon v Metro-Goldwyn Pictures Corporation, 2 Cir., 81 F.2d 49, 53.

Recent cases involving "side—by—side" comparison/parallel column analysis, approved in other District Courts, can be found in: Clarke v. G. A. Kayser & Sons, Inc., 472 F Supp 481, 482 (W.D.Pa. 1979); and Fyk v. Roth, No. 94—cv—3826, 1995 WL. 321803, at *2 (E.D.Pa. May 25, 1995).

Because uncovering "substantial and striking similarities" is determined through a two—prong test (both prongs of which must be met). The first prong is the "extrinsic test," "sufficient similarity"; and the second prong is the "intrinsic (inherent) test"; when copying is demonstrated by someone who has access to a copyrighted work, uses material substantially similar to the copyrighted work, in a manner which interferes with a right protected by 17 U.S.C. § 106." Ford Motor Company, 930 F.2d at 291. After both prongs have been met, they require scrutiny of the items by a "side—by—side" comparison. Consequently, the Court of Appeals' rejection of petitioner's "side-by-side" comparison test, in favor of their lone "abstraction—filtration—comparison test"; does not meet these copyright rules.

III. RIGHT TO A JURY TRIAL.

THE COURT OF APPEALS ERRED IN SANCTIONING A LOWER COURTS' DECISION, TO DENY THE PETITIONER DUE PROCESS OF LAW, AN EVIDENTIARY HEARING; AND AS STATED IN HIS COMPLAINT, A "DEMAND FOR A JURY TRIAL AND STATUTORY DAMAGES"; A VIOLATION OF THE SEVENTH AMENDMENT TO THE CONSTITUTION.

Petitioner/Fisher is a valid U.S.C. Title 17 registered copyright owner; and has exclusive rights under his copyrights. Fisher has a right to a trial by jury under the Seventh Amendment of the Constitution of the United States; and denying Fisher due process of law, is unconstitutional. The petitioner demanded a jury trial in his copyright Complaint.

The Seventh Amendment right to a jury trial, as preserved by Rule 38 of the Federal Rules of Civil Procedure, applies in copyright infringement actions. Similarity, access, and actionable copying are issues of fact for the jury in copyright infringement actions; in cases such as, Costello v. Loew's, Inc. (DC **Dist Col)** 159 F Supp 782, 116 USPQ 372; Bruckman v. Hollzer (1946, CA9 Cal) 152, F2d 730, 68 USPQ 252, Damages & Jury Trial; and parties also have a right to a jury trial on the issue of damages in an action seeking actual damages in the amount of profits derived by the defendants on account of its alleged infringement; in cases such as Broadcast Music, Inc. v Moor—Law, Inc. (FDC Del) 203 USPQ 487, 1979—1 CCH

Trade Cases ¶ 62510; Freedman v. Mangalick (FDC NJ) 27 FR Serv 2d 220. Accordingly, the issue of whether the petitioner's protected works and the accused works are "substantially similar" should be determined by an unbias jury.

IV. FALSE COPYRIGHT NOTICES.

THE COURT OF APPEALS ERRED IN SANCTIONING THE LOWER COURTS' EXCLUSION, OF PETITIONER'S DIRECT EVIDENTIARY FACTS (LETTERS FROM THE U. S. COPYRIGHT OFFICE) OF DEFENDANTS' ILLEGAL PUBLICATION, OF FALSE COPYRIGHT NOTICES; PUNISHABLE UNDER 17 U.S.C. § 506. CRIMINAL OFFENSES/18 U.S.C. § 2319.

The Tenth Circuit Court of Appeals erred in not prosecuting the defendants for their repeated publication of false copyright notices. These false notices were intended to imply the defendants had prior copyright protection to the petitioners. The petitioner presented into evidence many valid letters from the Copyright Office, Library of Congress, Washington, D.C., proving defendants published false copyright notices. This factor is a serious violation of U.S.C. Title 17, § 506 **Criminal offenses (a)** CRIMINAL INFRINGEMENT; and (c) FRAUDULENT COPYRIGHT NOTICE; U.S.C. Title 18 § 2319.

V. DEFENDANTS COPYING OF PETITIONER'S PURPOSELY MISSPELLED WORDS.

THE COURT OF APPEALS ERRED IN SANCTIONING THE LOWER COURTS' REJECTION OF PETITIONERS' DIRECT PROOF OF HIS "PUR-

POSELY MISSPELLED LEGAL WORDS"; ERRORS PUBLISHED IN THE DEFENDANT'S 1974 PRODUCTION; THE IDENTICAL MISSPELLED LEGAL WORDS, COPYRIGHTED AND REGISTERED IN PETITIONER'S ORIGINAL 1971 MANUSCRIPT; THAT DEFENDANTS ACCESSED IN 1972 AND 1973.

The Court of Appeals erred in rejecting the petitioner's direct proof of (accessed defendants) copying his purposely misspelled "legal" words in 1974; errors found only in the petitioner's original 1971 manuscript. Copying of errors is prima facie evidence of infringement; and accepted in the following cases:

Sammons v Larkin (1940 DC Mass) 38 F Supp 649, 49 USPQ 350, Mod on other grounds (CAl Mass) 126 F2d 341, 53 USPQ 71. Central Tel Co. v. Johnson Pub. Co., (DC Colo) 526 F Supp 838. Eckes v. Card Prices Update (CA 2 NY) 736 F2d 859, 222 USPQ 762. Financial Information, Inc. v Moody's Investors Service, Inc. (SD NY) 599 F Supp 994, 223 USPQ 552; and later proceeding (CA2 NY) 751 F2d 501, 224 USPQ 632. Jewelers Circular Pub Co. v. Keystone Pub. Co. (1922, CA 2 NY) 281 F 83, 26 ALR 571. cert. den 259 US 581, 66 L Ed 1074, 42 S Ct 464. Lawrence v. Dana (CC Mass) F Cas No 8136.

CONCLUSION

Petitioner Fisher implores that certiorari be granted in this case, because this court needs to preserve the constitutionality of the copyright laws; and clarify conflicts among appeals courts concerning an ethical procedure to uncover substantial and striking similarities. Fisher's utilization of a relevant and factual "side—by—side" comparison, could be fairly understood by an ordinary juror. Copyright issues have been said not to be too complex for decision by a jury and it would appear that most plaintiff's lawyers now ask for juries and that most copyright cases are now heard by juries. See; McMahon vs. Prentice—Hall, Inc. (ED Mo) 486 F Supp 1296, 6 Media I. R 1465, 205 USPQ 819.

The main question in this case, is whether a jury after viewing 527 substantial and striking similarities; and copying of petitioner's errors; and defendant's false copyright notices; would after viewing Fisher's "side-by-side" comparison, find that the 1974 accessed defendants did in fact infringe and plagiarize Fisher's 1971 prior registered exclusive copyrights?

The importance of this petition to the public cannot be overemphasized, because their will be other cartoonists trying to obtain (pro se) justice, through a legitimate "side—by—side" comparison of their accessed, registered features; and will find it impossible to obtain justice, because some circuit courts will apply their own "dicta," that is not binding in all courts; and in later cases as legal precedent. (State ex rel.) Foster v. Naftalin, 246 Minn. 181, 74 N.W. 2d 249. Wheeler v. Wilkin, 98. **Colo.** 568, 58 F.2d 1223, 1226.

To what extent did the constitution intend to allow "wide departures" (by lower courts) within the meaning and regulation of copyright protection; and how far must a copyright holder proceed in the courts to attain justice?

Respectfully submitted,

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APPENDIX C

As Ordered by Magistrate Abrams; Proof of Service on February 25, 1997, of all of petitioner's "Exhibits," to Baker & Hostetler; the Document Depository for all Defendants; per "Manual for Complex Litigation Third"; 21.444; "Document Depositories; Page 77. 1-2

APPENDIX

PHILIP CONDON FISHER,
Plaintiff—Appellant,

v.

UNITED FEATURE SYNDICATE INC., et al.,
Defendants-Appellees.

No. 99—1162.

United States Court of Appeals,
Tenth Circuit

February 7, 2000.

On March 3, 1999, pro se Plaintiff's copyright case was dismissed in the United States District Court for the District of Colorado, Case No. 96—D—1895; Judge Wiley *Y.* Daniel, U.S. District Court Judge; affirming the recused Magistrate Judge's recommendation; and district court's order. See, Fisher v. United Feature Syndicate, Inc., 37 F. Supp. 2d 1213 (D. Colo. 1999). Plaintiff appealed. The U. S. Tenth Circuit Court of Appeals, Case. No. 99-1162; three judge panel, Ebel, Kelly, and Briscoe, Circuit Judges; affirmed (without signing their own Order and Judgement) United States District Courts' dismissal, without an evidentiary hearing; and without reviewing Fisher's "side-by-side" evidence. http://caselaw. findlaw.com/cgi-bin/get case. p1?court= 1OTH&navby=case&no=991162

APPENDIX A

FILED
UNITED STATES DISTRICT COURT
DENVER, COLORADO
MAR 04 1999
JAMES R. MANSPEAKER
CLERK

In the United States District Court
For the District of Colorado
Judge Wiley Y. Daniel

Civil Action No. 96-D-1895
PHILIP CONDON FISHER,
Plaintiff,

v.

UNITED FEATURE SYNDICATE, INC. (a Scripps Howard Company), et al.,
Defendants.

ORDER AFFIRMING AND ADOPTING MAGISTRATE JUDGE'S RECOMMENDATION

This matter is before the Court on Plaintiff's pro se copyright infringement complaint pursuant to the Federal Copyright Act, 17 U.S.C. § 101 et seq. The matter was referred to Magistrate Judge Donald E. Abram for a Recommendation, which was issued on June 4, 1997 and is incorporated herein by reference. See 28 U.S.C. § 636(b), Fed. R. Civ. P. 72, D.C.COLO.LR. 72.4. In the Recommendation, Magistrate Judge Abram recommends that defendants' motions and respon-

sive pleadings be granted to the extent that they seek dismissal of Plaintiff's claims, and that the case be dismissed. Recommendation, at 22-26. On June 23, 1997, Plaintiff filed a timely Objection, which necessitates a de novo determination as to those specified proposed findings or recommendations to which objection is made since the nature of the matter is dispositive. Fed. R. Civ. P. 72(b); 28 U.S.C. § 636(b)(1).

I. Standard of Review

I first address Plaintiff's objections regarding the magistrate Judge's application of the correct standard of review for the Plaintiff's various claims and motions. Plaintiff initially challenges the Magistrate Judge's application of the standard of review for motions to dismiss. Objection, at 2-3. In ruling on a motion to dismiss, I "'must accept all the well pleading allegations as true and must construe them in the light most favorable to the plaintiff.'" David v. County and City of Denver, 101 F.3d 1344, 1352 (10th Cir. 1996) (quoting Gagan v. Norton, 35 F.3d 1473, 1474 n.1 (10th Cir. 1994)). " A complaint may be dismissed pursuant to Fed. R. Civ. P. 12(b)(6) only 'if the plaintiff can prove no set of facts to support a claim for relief.'" Id. (quoting Jojola v. Chavez, 54 F.3d 488, 490 (10th cir. 1995)). Plaintiff claims that the Magistrate Judge did not construe all factual allegations in his favor. Objection, at 2. Yet Plaintiff provides no evidentiary support for this claim other than conclusory statements. After reviewing the Recommendation and the record in this case, I conclude that the Magistrate Judge properly applied the correct standard of review.

Plaintiff also requests that this court grant his motions for summary judgement. Objection at 3. Summary judgement

is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 55(c); accord Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986). The moving party bears the initial burden of proof showing that there is an absence of any issues of material fact. Celotex Corp. v. Catrett, 477 U.S. 37, 323 (1986). In copyright cases, only after the moving party has properly supported his summary judgment motion will the burden shift to the non-moving party to rebut with significant evidence. See McRae v. Smith, 968 F. Supp. 559, 561 (D. Colo. 1997). After reviewing the record in its entirety and for the reasons discussed below, I conclude that the plaintiff's summary judgment motion is without merit and must be denied.

II. Discussion

Plaintiff's objections focus on Magistrate Judge Abram's dismissal of his claims as a pro se litigant. Since Magistrate Judge Abram based his findings on both procedural and substantive grounds, I will similarly address Plaintiff's objections to the Recommendation first as to procedure and then as to substance.

A. Rule 8

Plaintiff argues that Magistrate Abram failed to apply the correct standard of review for a pro se litigant's pleadings. Objection, at 2. Plaintiff claims that the Magistrate Judge's negative characterizations of his Complaint do not comport with the liberal construction rule that applies to pro se litigants. Id. at 2. Plaintiff further argues that the Complaint is brief as long

as the supplements are excluded. Id. at 4.

Pleadings should contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P 8(a)(2). Failure to comply with Rule 8(a)(2) may result in dismissal. See Carpenter v. Williams, 86 F.3d 1015, 1016 (10th Cir. 1996). Courts, however, should liberally construe pleadings prepared by a pro se litigant. Haines v. Kerner, 404 U.S. 519, 520 (1972); Gagan v. Norton, 35 F.3d 1473, 1474 n.1 (10th Cir. 1994), cert. denied, 115 S. Ct. 1175 (1995). Nevertheless, the Court cannot "assume the role of advocate for the pro se litigant." Hall v. Bellmon, 935 F.2d 1106, 1110 (10th Cir. 1991). With the supplements, I find hat the Plaintiff's Amended Complaint is approximately 140 pages long and contains 43 often repetitive, rambling paragraphs and conclusory allegations. Although Plaintiff is a pro se litigant, I am unwilling to liberally construe Plaintiff's pleadings to the point of excluding Rule 8's clear mandate. After reviewing the Complaint, I concur with the Magistrate Judge's findings that the plaintiff has failed to comply with the requirements of Rule 8(a)(2).

B. Statute of Limitations:

In challenging the Magistrate Judge's recommendation regarding the statute of limitations, Plaintiff first claims that the Defendant's misleading conduct of repeated infringement violations delayed Plaintiff from filing suit before the statute of limitations expired. Objection, at 4. A cause of action for copyright infringement under section 507(b) of the Copyright Act accrues "when one has knowledge of a violation or is chargeable with such knowledge." Roley v. New World Pic-

tures, Ltd., 19 F.3d 479, 481 (9th Cir. 1994). Plaintiff's relies on Hearld Music Co. v. Living Music, Inc., 205 U.S.P.Q. 1241 (S.D.N.Y. 1978), to support his claim that the Defendants' conduct should estop them from raising the statute of limitations defense. Objection, at 4. Plaintiff's reliance on Hearld Music is misplaced. In Hearld Music, the court held that the defendants were estopped from asserting the statute of limitations defense because they had misled the plaintiff into believing litigation was unnecessary, resulting in expiration of statute of limitations. Hearld Music, 205 U.S.P.Q. at 1243. In contrast, Plaintiff here argues that it was the inundation of the alleged violations that delayed him. Objection, at 4-5. Plaintiff provides no explanation or evidence, other than conclusory statements, as to how Defendant's allegedly repeated violations misled and discouraged him from asserting his rights in court. Therefore, I find Defendants' alleged conduct is not misleading behavior for purposes of estopping the Defendants' from asserting their statute of limitations defense.

Plaintiff also seeks to avoid the statute of limitations deficiencies by alleging a "continuing wrong" exception as adopted by the Seventh Circuit in Taylor v. Meirick, 712 F.2d 1112 (7th Cir. 1983). Section 507(b) of the Copyright Act states that "[n]o civil action shall be maintained under the provisions of this title unless it is commenced within three years after the claim accrued." 17 U.S.C. § 507(b). Plaintiff's proposed exception would allow him to recover damages for all infringements more than three years in the past as long s the infringement is continuing and the last infringement occurred within three years prior to initiating suit. Taylor, 712 F.2d at 1118-19. Several Circuits, however have held that section 507(b) bars recovery of damages on any claim accruing more than three

years prior to filing suit. Roley v. New World Pictures, Ltd., 19 F.3d 479,481 (9th Cir. 1994); Stone v. Williams, 970 F.2d 1043, 1049-50 (2d Cir. 1992), cert. denied, 508 U.S. 906 (1993); Hoste v. Radio Corp. of America, 654 F2d. 11, 11-12 (6th Cir. 1981); see also Mai Basic Four, Inc., v. Basis, Inc., 962 F.2d 978, 987 n.9 (10th Cir. 1992) (recognizing a division among the Circuits over interpretations of section 507(b)). I am persuaded by this latter view and decline to apply Plaintiff's proffered exception here.

Plaintiff also argues that the Defendant's fraudulent concealment of their copyrights justify equitable tolling of the statute of limitations. Objection, at 6. To establish fraudulent concealment as a basis for tolling the statute of limitations under Colorado law, Plaintiff must show (1) that Defendants "in equity and good conscience" should have disclosed their copyright notices; (2) that Defendants knowingly and intentionally concealed; (3) that Plaintiff was deceived; and (4) that Plaintiff suffered damages as a result. Smith v. Boyett, 908 P.2d 508, 512 (Colo. 1995). Throughout his Objection, Plaintiff makes broad, conclusory statements which do not address the individual elements of his fraudulent concealment claims. I therefore conclude that these claims have no merit. Having reviewed the Amended Complaint, the Recommendation, and Plaintiff's Objection, I affirm the Magistrate Judge's findings on the statute of limitations issue.

C. Standing

Plaintiff next seeks to introduce new evidence to avoid Magistrate Judge Abram's recommendation that Plaintiff lacks standing to assert causes of action which accrued between September 12, 1993 and September 1996. Objection, at 7-8. Dur-

ing this time Plaintiff was not the legal owner of the copyrights at issue because he has assigned these exclusive rights to a corporation in 1988, 1990, and 1991. Recommendation, at 6-7. The corporation subsequently transferred those rights back to him in September 1996. Id. at 6. Section 501(b) of the Copyright Act states that "[t]he legal or beneficial owner of an exclusive right under a copyright is entitled to institute an action for any infringement of that particular right committed while he or she is the owner." 17 U.S.C. § 501(b). "[A] copyright owner can assign its copyright but, if the accrued causes of action are not expressly included in the assignment, the assignee will not be able to prosecute them." ABKO Music, Inc. v. Harrisongs Music, Ltd., 944 F.2d 971, 980 (2d Cir. 1991). Magistrate Judge Abram found that the minutes of the September 25, 1996 meeting, at which the corporation ratified the sale and transfer to Plaintiff of the copyrights at issue, failed to include any express accrued causes of action. Recommendation, at 6-7. He therefore recommended dismissal of all infringement claims which has accrued during the corporation's ownership of the copyrights. Id. at 7.

On June 23, 1997, Plaintiff filed with the Court amended minutes of the September 25, 1996 meeting, which assign the necessary accrued causes of action to Plaintiff. Objection, at 7-8. A district judge must make a de novo determination of the Magistrate Judge's Recommendation based on the record. Fed. R. Civ. P. 72(b). "[A] district judge may accept, reject, or modify the recommended decision, [or] receive further evidence." Id. I conclude that the copyrights at issue were transferred to the Plaintiff in September 1996 for the purpose of enabling him to prosecute this case with respect to all accrued causes of action. See Motion to Amend Complaint. Therefore, bearing in mind

that Plaintiff is pro se, I will allow Plaintiff's submitted minutes which cure the procedural deficiency on this point. Although I conclude that the accrued causes of action are properly before this Court, they nonetheless fail on their substantive merits for the reasons discussed below.

III. Copyright Infringement

Notwithstanding the procedural defects of the Plaintiff's claims, I have examined the Plaintiff's specific objections to the Magistrate Judge's Recommendation with regard to the substantive merits of the copyright infringement claims. In order for a plaintiff to prevail on a claim for copyright infringement, "Plaintiff must establish both: (1) that it possesses a valid copyright and (2) that Defendants 'copied' protectable elements of the copyrighted work." Country Kids 'N City Slicks, Inc., v Sheen, 77 F.3d 1280, 1284 (10th Cir. 1996). In addition to direct evidence of copying, "Plaintiff can indirectly prove copying by establishing that Defendants had access to the copyrighted work and that there are probative similarities between the copyrighted material and the allegedly copied material." Id; Autoskill, Inc., v. National Educ. Support Sys., 994 F.2d 1476, 1489 (10th Cir. 1993). Liability for copyright infringement will only attach where the Plaintiff can prove that the protected elements of the copyrighted material were copied. Gates Rubber Co. v. Bando Chem. Indus., Ltd., 9 F.3d 823, 833 (10th Cir. 1993). Copyright law protects only the expression of an idea, not the idea itself. Autoskill, 994 F.2d at 1491. The copyright Act states that copyright protection does not extend to "any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.

17 U.S.C. 102(b) (1996).

To prove substantial similarity between the copyrighted work and the alleged infringing work, the Tenth Circuit has adopted the "abstraction-filtration-comparison" test. Country Kids, 77 F.3d at 1284. The first step of abstraction requires the Court to separate the unprotectable ideas from the work's original expression. Id. at 1285. Second, the Court filters out all other unprotectable elements from the expression. Id. Finally, the court compares the remaining protected elements to the allegedly infringed original work and determines whether the works are substantially similar. Id. In making this determination, the Court looks to see if the similarities between the works are so similar that an ordinary reasonable person would find that the defendant had unlawfully infringed the plaintiff's original work. Id. at 1288. "The essence of this test is whether the 'ordinary observer, unless he set out to detect the disparities, would be disposed to overlook them, and regard their aesthetic appeal as the same.'" Id. (quoting Peter Pan Fabrics, Inc. v. Martin Weiner Corp., 274 F.2d 487 489 (2d Cir. 1960)).

A Court may find non-infringement as a matter of law where the similarity between the works concerns only non-copyrightable elements of the plaintiff's work or no reasonable jury could find the two works to be substantially similar. Warner Bros. Inc. v. American Broadcasting Companies, 720 F.2d 231, 240 (2d Cir. 1983).

A. Chipper Sherlock Dog vs. Snoopy Sherlock Dog

Plaintiff first objects to the Magistrate Judge's finding that as a matter of law no reasonable jury would find Plaintiff's "Chipper" cartoon to be substantially similar to the Snoopy

character, as portrayed in "It's a Mystery, Charlie Brown" and the Metropolitan Life commercials. In his Amended Complaint, Plaintiff argued that the portrayal of Snoopy as a cowardly detective dog infringed Plaintiff's prior original copyrighted work, "Chipper." In his Recommendation, the Magistrate Judge found that Plaintiff relied primarily on his allegations that both Snoopy and Chipper were cowardly detective dogs to establish his copyright infringement claim. Recommendation, at 12. The Magistrate Judge held for Defendants as a matter of law upon finding that Plaintiff had failed to establish any other similarities between the two characters other than they were both dog detectives. Id.

In his Objection, Plaintiff adds little to his original arguments on this issue. In addition to arguing that the concept of a cowardly detective dog is protected expression, Plaintiff argues that the allegedly copied misspellings, "Baratry" and "Repleven," plus the Snoopy sherlock dog's cowardly behavior in specific sequences, serve as proof of infringement. Objection, at 13-14. I disagree. "in determining whether a character in a second work infringes a cartoon character, courts have generally considered not only the visual resemblance but also the totality of the character's attributes and traits." Warner Bros. v. American Broadcasting Co.s, Inc., 720 F.2d 231, 241 (2d cir.n 1983). After reviewing the record I conclude that the totality of the alleged similar traits and attributes, viewed in the light most favorable to the Plaintiff, fails to satisfy the ordinary observer test.

Furthermore, Plaintiff has failed to indicate how his allegations would satisfy the abstraction-filtration-comparison test under the ordinary observer standard. Plaintiff asks this Court

to adopt a "Parallel Column Analysis" approach which would show similarities side-by-side and argues that similarities viewed in this light support his case. Objection, at 15-16 (citing Arnstein v. Porter, 154 F.2d 464 (2d Cir. 1946); Greenbie v. Noble, 151 F. Supp. 45 (D.C.N.Y. 1957)). I disagree. Plaintiff's explanations of his evidence under this approach still fails to address or satisfy the reasonable observer standard. I therefore affirm the Magistrate Judge's Recommendation as to this issue.

B. "Chipper" the Cartoon Dog vs. "Chipper" the Puppy

Plaintiff next objects to the Magistrate Judge's finding as a matter of law for Defendant RCA on his twentieth claim that Defendant RCA infringed the name and label of Plaintiff's copyrighted comic strip, "Chipper," in its promotional materials. The Magistrate Judge first determined that Plaintiff had not alleged or established Defendants' access to Plaintiff's work. Recommendation, at 14. Unless Plaintiff can provide direct evidence of copying, he must establish both access and substantial similarity. Country Kids, 77 F.3d at 1284. Plaintiff may meet his initial burden of establishing access by showing that defendant had a reasonable opportunity to view or copy the allegedly infringed work. Autoskill, 94 F.2d at 1490. In his Objection, Plaintiff argues that his third claim in the Amended Complaint and exhibit #10 establish access to Defendant RCA. Objection, at 17-18. The Amended Complaint, however, contains only allegations of access to Defendant Random House. Complaint, at 27-29. Plaintiff's subsequent allegations in his Objection that RCA owned Random House are not contained in the Amended Complaint. Instead, Plaintiff seeks to amend his Amended Complaint through his Objection. Furthermore,

after reviewing the Amended Complaint and exhibits, I find that Plaintiff has provided no other charges or evidence suggesting access to RCA. I will not allow Plaintiff to amend his Amended Complaint based on his Objection.

Plaintiff's argument for substantial similarity also fails. In general, copyright protection does not extend to "[w]ords and short phrases such as names, titles, and slogans; familiar symbols or designs; [and] mere variation of typographic orientation, lettering, or coloring." 37 C.F.R. 202.1; see, e.g., Arvelo v. American Int'l Ins. Co., 875 F. Supp. 95, 100-1 (D.P.R.), aff'd, 66 F.3d 306 (1st Cir. 1995) (holding that two words in copyrighted advertising campaign did not receive full protection, were not a substantial portion of the advertising campaign, and could not be protected once removed from the advertising campaign's context.) Plaintiff alleges that RCA used the "Chipper" name and label with a similar "concave outer border design" in a caption. Objection, at 18. Plaintiff, however, provides no other allegations or evidence of additional copyright or trademark protection other than the original copyright protecting the "Chipper" comic strip as a whole. I therefore conclude that Plaintiff has failed to state a claim for copyright infringement of the "Chipper" name and label.

C. "Chicken Chipper" vs. "Chick'n Chipper"

Plaintiff also objects to the Magistrate Judge's recommended dismissal of his twentieth claim, alleging that the "Chick'n Chippers" name for Defendant Tyson Foods' chicken products infringed the phrase "Chicken Chipper," which Plaintiff uses in his comic strip. Objection, at 18-20. The Magistrate Judge found that Plaintiff had not alleged access as to this

claim and Plaintiff failed to respond to this deficiency in his Objection. Recommendation, at 15; Objection, at 18-20. Furthermore, as noted above, words and phrases are not entitled to copyright protection. 37 C.F.R. § 202.1; see Arvelo, 875 F. Supp. at 100-1. Plaintiff provides no other evidence other than his own conclusory statement that the close similarities between the two phrases is sufficient evidence of infringement. After reviewing the record in this case, I find that Plaintiff has not stated a claim for copyright infringement on this issue.

D. "Chipper" vs. Peanuts and Other Comic Strips

In his remaining objections regarding the "Chipper" comic strip, Plaintiff argues with general conclusory statements that defendants have infringed his "attitude," "meaning," "style of expression," "sequence of events," "character's dispositions," and "reactions," which he alleges are, in fact, the expression of his ideas. Objection, at 20-35. For the reasons discussed above and after reviewing the Amended Complaint and exhibits, I find Plaintiff's specific objections to be without merit. I concur with the Magistrate Judge's opinion that Plaintiff fails to understand the fundamental differences between idea and expression. Plaintiff would ask this Court to grant him a monopoly on unprotected elements, such as themes, emotions, and attitudes on which comic strips commonly rely. This I decline to do.

In addition, Plaintiff has simply failed to argue that any of his allegations would lead an ordinary observer after applying the abstraction-filtration-comparison test that substantial similarities exist between Plaintiff's original work and the Defendants alleged infringing works. Plaintiff instead insists his

own Parallel Column Analysis satisfies his burden. See, e.g., Objection, at 22, 28 (urging the Court to consider his Parallel Column Analysis). Moreover, even after reviewing the Plaintiff's arguments and comparisons, I cannot conclude that a reasonable observer would view the similarities as substantial. "[S]imilarity of idea or function must be distinguished from similarity of artistic expression." Durham Indus., Inc. v. Tomy Corp., 630 F.2d 905, 913 (2d. Cir. 1980). "[W]here the protected work and the accused work express the same idea, the similarity that inevitably stems solely from the commonality of the subject matter is not proof of copying." Id. As Plaintiff's arguments and exhibits illustrate, comic strips commonly rely on similar themes, "meanings," and attitudes. Nevertheless, taken together, I find that the similarities are not of expression, but of ideas and require that the Magistrates Judge's recommendation be affirmed with regard to these claims.

E. "Langsyne" Comic Strip vs. "For Better or Worse" Comic Strip

Plaintiff again objects to the Magistrate Judge's finding that the alleged similarities between scenarios in his "Langsyne" comic strip and a "For Better Or Worse" comic strip are only of ideas. Plaintiff states that the "For Better or Worse" comic strip infringed his "Langsyne" expression, which he states is as follows: "Your friends may think your sister or brother is very attractive, but your closer family relationship develops opposite feelings." Objection, at 36. Plaintiff's alleged expression is an idea not protected under the copyright Act. I therefore affirm the Magistrate Judge with respect to his claim.

I have reviewed all of Plaintiff's remaining objections

in his original Objection and find them without merit.

For the reasons stated above, the Court concludes that the Magistrate Judge's Recommendation should be affirmed and adopted. Accordingly, it is

ORDERED that the June 4, 1997 Recommendation of Magistrate Judge Abram is AFFIRMED. It is

FURTHER ORDERED that Defendants' Motions to Dismiss are GRANTED in accordance with the Recommendation. It is

FURTHER ORDERED that all remaining outstanding motions filed in this case are DENIED as moot. It is

FURTHER ORDERED that this case is dismissed with prejudice, each party to pay their own costs and attorneys fees.

DATED THIS 3 day of March, 1999.

BY THE COURT

s/Wiley Y. Daniel
WILEY Y. DANIEL
U.S. District Court Judge

APPENDIX B

FILED
United States Court of Appeals
Tenth Circuit
FEB 7 2000
PATRICK FISHER, Clerk

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PHILIP CONDON FISHER, Plaintiff-Appellant, v. UNITED FEATURE SYNDICATE, INC., a Scripps Howard company; DENVER PUBLISHING COMPANY; E.W. SCRIPPS COMPANY; CHARLES SCHULZ; LEE MENDELSON, Producer; BILL MELENDEZ; BARR ARTHUR PRODUCTIONS, INC.; WHOLESALE WAREHOUSING OF CANADA; CBS, INC.; NEWS AMERICA PUBLISHING, INC., KELLOGG COMPANY; METROPOLITAN LIFE INSURANCE COMPANY; CAPITAL CITIES/ABC, INC.; TCI OF COLORADO; GENERAL ELECTRIC COMPANY; TURNER BROADCASTING SYSTEM, INC.;	No. 99-1162 (D.C. No. 96-D-1895) (D. Colo.)

UNIVERSAL PRESS SYNDICATE, INC.; SEARS, ROEBUCK AND COMPANY; MONTGOMERY WARD & COMPANY; KACEY FINE FURNITURE; SOUNDTRACK; FINGERHUT CORPORATION; BEST BUY COMPANY; TYSON FOODS, INC.; WALT DISNEY COMPANY; ADVANCE PUBLICATIONS INCORPORATED; S.I. HOLDINGS INC.; THOMSON CONSUMER ELECTRONICS,

Defendants-Appellees,
and

KARTES VIDEO COMMUNICATIONS, CYCLONE INCORPORATED; KING FEATURES SYNDICATE, INC.; COWLES SYNDICATE, INC.,

Defendants.

ORDER AND JUDGMENT

Before EBEL, KELLY, and BRISCOE, Circuit Judges.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed. R. App. P. *34(a)(2);* 10th Cir. R. 34.1(G). Therefore plaintiff's request for oral argument is denied and the case is ordered submitted without oral argument.

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* This order and judgment is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

Plaintiff Philip Condon Fisher, appearing pro se, brought this action against defendants, claiming that defendants had infringed copyrights Fisher held in a comic strip character named "Chipper" and a comic strip named "Langsyne." After considering Fisher's many objections, the district court affirmed and adopted the magistrate judge's recommendation that defendants' various motions to dismiss be granted and that Fisher's motions for summary judgment be denied. *See Fisher v. United Feature Syndicate, Inc.*, 37 F. Supp. 2d 1213 (D. Colo. 1999).

Fisher appeals, claiming that the district court erred (1) in dismissing his claims that United Feature Syndicate's 1974 feature "It's A Mystery Charlie Brown," starring "Snoopy" as a Sherlock Holmes-type detective dog infringed his copyrights; (2) in dismissing his claims that Metropolitan Life Insurance Company's television advertisements starring "Snoopy" as a Sherlock Holmes-type detective dog infringed his copyrights; (3) in dismissing his claims against several defendants owned by RCA (the RCA defendants) for copyright infringement; (4)

in dismissing his claims that defendant Tyson Foods infringed his copyright by use of its "CHICK 'N CHIPPERS" label on one of its chicken products; (5) in dismissing his claims that defendant Universal Press Syndicate's "For Better Or For Worse" comic strip plagiarized his copyrighted "Langsyne" comic strip; and (6) in dismissing his claim that United Feature Syndicate infringed his copyright in its comic strip "DRABBLE."[1] We have jurisdiction pursuant to 28 U.S.C. § 1291, and, following a careful review of this case, we affirm.

We review de novo the sufficiency of a complaint to survive a Fed. R. Civ. P. 12(b)(6) motion to dismiss for failure to state a claim for which relief may be granted. *See Bauchman ex rel. Bauchman v. West High Sch.*, 132 F.3d *542*, 550 (10th Cir. 1997). Accepting any well-pleaded allegations of the complaint as true and construing them in the light most favorable to the plaintiff, the district court may appropriately dismiss a complaint only when it appears that the plaintiff can prove no set of facts in support of his claims that would entitle him to relief. *See Yoder v. Honeywell, Inc.*, 104 F.3d 1215, 1224 (10th Cir. 1997). We construe Fisher's pro se pleadings liberally. *See Haines v. Kerner*, 404 U.S. 519, 520-21 (1972).

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[1] Fisher filed a mostly unintelligible 128-page, 300-paragraph, 43-claim complaint against forty-one defendants seeking over $3 billion in damages. Fisher filed two large boxes of exhibits with his complaint which were not served on defendants. In an amended complaint, he incorporated the exhibits by reference, but still failed to serve defendants with the exhibits. Following an unsuccessful appeal of the district court's order requiring service of the exhibits, the court granted the defendants' motions to quash service based on Fisher's failure to serve all de-

fendants with copies of the exhibits. Although it is unclear as to whether Fisher ever properly served defendants with the exhibits, the magistrate judge addressed the merits of Fisher's claims because the defendants addressed the merits in their various motions to dismiss. *See Fisher,* 37 F. Supp. 2d at 1222 and n.2.

1. Copyright Infringement

"In order to prevail on [his] copyright infringement claim. [p]laintiff must establish both: (1) that [he] possesses a valid copyright and (2) that [defendants 'copied' protectable elements of the copyrighted work." *(Country Kids 'N City Slicks, Inc. v. Sheen,* 77 F.3d 1280, 1284 (10th Cir. 1996) (quoting *Feist Pubs., Inc. v. Rural Tel. Serv. Co.,* 499 U.S. 340, 361 (1991)). Initially, our inquiry here focuses on whether, as a factual matter, defendants copied Fisher's comic strip. *See id.* Second, we must determine, as a mixed issue of fact and law, if the copied elements of Fisher's work, if any, were protectable under his copyright. *See id.* The Copyright Act provides that copyright protection does not extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated or embodied in such work." 17 U.S.C. § 102(b). "One of the fundamentals of copyright law is that a copyright does not protect an idea, but only the expression of the idea." *Autoskill Inc. v. National Educ. Support Sys., Inc.,* 994 F.2d 1476. 1491 (10th Cir. 1993). Fisher can prove copying either directly, or indirectly by establishing that defendants "had access to the copyrighted work and that there are probative similarities between the copyrighted material and the allegedly copied material." *Country Kids 'N City Slicks, Inc.,* 77 F.3d at 1284.

In making a determination of whether defendants' work is substantially similar to the protected elements of Fisher's work, this circuit applies an "'abstraction-filtration-comparison"' test, requiring that we (1) "separate the ideas (and basic utilitarian functions), which are not protectable, from the particular expression of the work[;]" (2) "filter out the nonprotectable components of the product from the original expression[;]" and (3) "compare the remaining protected elements to the allegedly copied work to determine if the two works are substantially similar."[2] *Id.* at 1284-85; *see also Gates Rubber Co. v. Banlo Chem. Indus., Ltd.*, 9 F.3d 823, 834-42 (10th Cir. 1993). In determining whether the two works are substantially similar, the court inquires " 'whether the accused work is so similar to the plaintiffs work that an ordinary reasonable person would conclude that the defendant unlawfully appropriated the plaintiffs protectable [sic] expression by taking material of substance and value."' *Country Kids 'N City Slicks, Inc.*, 77 F.3d at 1288. (quoting *Atari, Inc v North Am. Philips Consumer Elecs. Corp.*, 672 F.2d 607, 614 (7th Cir. 1982)).

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2. We reject, as did the district court, Fisher's urging that we abandon the abstraction-filtration-comparison test in favor of a "parallel column analysis" which purports to show by means of comparison of parts and portions of Fisher's comic strip and defendants various depictions, the similarity between the two.

A. "Snoopy" v. "Chipper"

In his complaint, Fisher alleged that United Feature Syndicate, Inc., Charles Schulz, and various other individuals and entities associated with the "Peanuts" comic strip character, "Snoopy," and the story "It's A Mystery Charlie Brown," infringed his copyrights by depicting "Snoopy" in the role of a detective clad in a Sherlock Holmes hat and cape with a large horn pipe and magnifying glass. Fisher alleged that this depiction infringed his copyrighted comic strip portraying a "cowardly" detective dog named "Chipper." Fisher also claimed that a television commercial for Metropolitan Life Insurance Company using "Snoopy" in his Sherlock Holmes role infringed on his "Chipper" copyrights. Both claims are without merit.

In affirming the magistrate judge's dismissal recommendation on this claim, the district court rejected Fisher's contention that because both "Snoopy" and "Chipper" were portrayed as "cowardly detective dog[s]," the two were "substantially similar." *Fisher,* 37 F. Supp. 2d at 1218. The court concluded that Fisher relied exclusively on the cowardly detective dog similarity and did not satisfy the "abstraction-filtration-comparison" test under the reasonable observer standard. *See id.* at 1219. We agree.

As defendants point out in their brief, "Snoopy" was on the scene in 1950, more than twenty years before Fisher copyrighted his "Chipper" character in 1974. *See* Appellees' Jt. Br. at 12. Defendants also noted that during those twenty years "Snoopy" was depicted in numerous roles, including a 1962 "Peanuts" episode submitted as an exhibit by Fisher depicting "Snoopy" dressed in a Sherlock Holmes hat and pipe. *See id.* at

12 n.5. Defendants also contend that while Fisher portrays "Chipper" as a "humanized" dog, *see id.* at 20, "Snoopy" is, and always has been, depicted as a dog, "Charlie Brown's" pet. *see id.* at 12. Fisher alleges that "Snoopy's" depiction as "cowardly" in "It's A Mystery, Charlie Brown," was a departure from his usual depiction as heroic, and was therefore, evidence of copying. Defendants' respond, and we agree that while the "Snoopy" detective character has been depicted as running away if startled, he has always been depicted as a character with "bravado" and has never been depicted as either particularly heroic or cowardly.

Here, it is undisputed that Fisher holds a valid copyright on his "Chipper" comic strip character. *See Feist Pubs. Inc.*, 499 U.S. at 361. However we agree with the district court that Fisher failed to establish sufficient similarities between his "Chipper" comic strip and the detective dog portrayed by "Snoopy" in "It's A Mystery Charlie Brown" to support his claim that defendants copied his work. *See Gates Rubber Co.*, 9 F.3d at 832. Moreover, even if we were to assume that defendants copied portions of Fisher's work, we cannot conclude that those portions are "protected expression and of such importance to the copied work that the appropriation is actionable." *Id.*

Copyright protection is afforded only to original works *See* 17 U.S.C. *§* 102(a); *Feist Pubs., Inc.*, 499 U.S. at 345 ("To qualify for copyright protection, a work must be original to the author. Original, as the term is used in copyright means only that the work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity.") (citation omitted). Under the *"scenes a faire* doctrine." expressive elements of a work

are not entitled to copyright protection if they "are standard stock, or common to a particular topic, or . . . necessarily follow from a common theme or setting." *Gates Rubber Co.,* 9 F.3d **at 838;** *see also Auioskill.* 994 F.2d at 1494. Here the Sherlock Holmes treatment is an expression which is common to the detective idea, and "is lacking in the originality that is the *sne qua non* for copyright protection." *Gates Rubber Co.,* 9 F.3d at 838; *see also Alitel, Inc. v. Iqiel. lnc.,* 124 F.3d 1366, 1374-75 (10th Cir. 1997) (noting that "the Irish cop" in "often-recurring themes of police fiction," are unprotected *scenes a faire)* (quotation omitted).

Likewise, Fisher's claim that the appearance of the misspellings of the legal terms "baratry" (barratry) and "repleven" (replevin), in the "It's a Mystery, Charlie Brown" book is prima facie evidence of infringement fails for the same reason. Fisher contends that these are copies of "clerical and typographical errors proving piracy. Appellant's Br. at 6. If there was no other justification for the errors appearing in the book, they could, as Fisher contends suggest copying. *See Central Tele. Co. of Va. v. Johnson Pub. Co.,* 526 F. Supp. 838. 844 (D. Cob. 1981) (opining that the existence of common errors in two telephone directories was strong evidence of copying). As defendants argue however, these errors appear to be in line with the comic strip characters' proclivity for misuse and mispronunciation of legal terms in the Charlie Brown strip. As such, they could be construed as an integral part of the humor or subject matter, a construction that would not give rise to a suggestion of copying. *See Gates Rubber Co.,* 9 F.3d at 838.

Moreover, even if we were to consider the common errors to be some evidence of copying, this does not relieve Fisher of

his burden of proving more substantial similarities between the works, a burden he did not meet. *See Country Kids 'N City Slicks, Inc.*, 77 F.3d at 1288.

The idea of a detective dog is an element which is not included in copyright protection. *See* 17 U.S.C. § 102(b). Moreover, an expression of that idea in a manner which is as common in the public domain as Sherlock Holmes falls under the *scenes a faire* doctrine, is not entitled to copyright protection and "cannot serve as the basis for ultimate liability for copyright infringement." *Gates Rubber Co.* 9 F.3d at 832 n.7.

This same rationale applies equally to Fisher's contention that defendant Metropolitan Life Insurance Company infringed his copyright when they used "Snoopy" in his role as a detective dog in its television commercials. Therefore, the district court's dismissal of these claims for failure to state a claim upon which relief may be granted was correct.

B. "Chipper" the comic strip v. "Chipper" the puppy

Fisher claimed that newspaper and television advertisements for various RCA defendants featuring a picture of a puppy named "Chipper" infringed on his copyright to the name and label of his comic strip. In rejecting this argument, the district court concluded that Fisher had neither met his "burden of establishing access by showing that defendant had a reasonable opportunity to view or copy the allegedly infringed work," or shown substantial similarity. *Fisher.* 37 F. Supp. 2d at 1219. We agree, and affirm the district court on this claim for the reasons stated in its order. *See id.*

C. "Chicken Chipper" v. "Chick 'n Chipper"

Next, Fisher asserts that the district court erred in dismissing his copyright infringement claim against defendant Tyson Foods. Fisher contends that defendant's use of the phrase "Chick 'N Chippers" on one of is food products is a copy of the phrase "Chicken Chipper" which Fisher used in his copyrighted comic strip. Again the district court found that Fisher failed to allege access, *see Country Kids 'N City Slicks, Inc.*, 77 F.3d at 1284. and failed to address this deficiency in his objections to the magistrate judge's recommendation. Fisher does not provide any more support on appeal. Therefore, we affirm the district court's dismissal of this claim for the reasons stated in its order. *See Fisher.* 37 F. Supp. 2d at 1220.

D. "Langsyne" v. "For Better or For Worse"

In his fifth claim of error, Fisher contends that the district court erred in dismissing his claim against defendant Universal Press Syndicate alleging that defendant's comic strip of November 15, 1992, "For Better or For Worse," infringed Fisher's copyright of his 1975 comic strip "Langsyne." This claim was dismissed by the district court as outside the applicable statute of limitations. *See Fisher,* 37 F. Supp.2d at 1222-23. On appeal, Fisher continues to argue the merits of his claim, while neglecting to address any error in the district court's finding that the claim was barred by the statute of limitations. We, therefore affirm the district court's dismissal of this claim for the reasons stated in its order. *See id.*

E. "Chipper" v. "Drabble"

Finally, Fisher contends that defendant United Feature Syndicate infringed his copyright in its October 10, 1993, comic strip "Drabble." In affirming the magistrate judge's recommendation that this claim be dismissed, the district court agreed that Fisher continues to misunderstand the scope of copyright protection in his allegations that the appearance of similar ideas, words, and phrases in other comic strips proves copyright infringement. The court concluded that none of the alleged offending comic strips could be found to be substantially similar to Fisher's "Chipper" strip. *See id.* at 1220. We agree, and affirm the district court on this claim also.

II. Conclusion

In conclusion, we affirm the district court's dismissal of Fisher's claims for the reasons stated above and for substantially the same reasons stated in the magistrate judge's recommendation and the district court's order. *Fisher,* 37 F. Supp. 2d 1213. Insofar as Fisher attempts to pose new arguments in his reply brief, this court does not consider issues not raised and argued in the opening brief. *See State Farm Fire & Casualty Co. v. Mhoon.* 3 1 F. 3d 979. 984 n.7 (10th Cir. 1994); *Codner v. United States,* 17 F.3d 1331. 1332 n.2 (10th Cir. 1994). Fisher's motion to strike portions of appellees' joint answer brief is DENIED. Defendant Tyson Foods' motion to strike "addendum I" to appellant's reply brief is GRANTED. The judgment of the United States District Court for the District of Colorado is AFFIRMED.

Entered for the Court

David M. Ebel
Circuit Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Civil Action No. 96-WM-1895

PHILIP C. FISHER,
Plaintiff,

vs.

UNITED FEATURE SYNDICATE, INC., et al.,
Defendants.

AFFIDAVIT OF DELIVERY

I, Sam Stephens, the affiant, being duly sworn, say: that I am over the age of eighteen years and am not a party to the within action, and that I have duly delivered two complete sets of exhibits, as listed in the EXHIBITS INDEX attached hereto, together with Certification of Plaintiff's Duplicate Exhibits Served to Baker and Hostetler on February 25, 1997, in the following manner:

By handing and delivering to Todd Lundly personally, Attorney at Law, at the offices of Baker and Hostetler, 303 East Seventeenth Avenue, Suite 1100, City and County of Denver, State of Colorado, on February 25, 1997 at 11:15 A.M.

s/ Sam Stephens
Sam Stephens
Private Process Server

Subscribed and sworn before me on this 25th day of February, 1997. My commission expires on October 25, 1997.

Stamp:
Notary Public
State of Colorado
Ramona K. Petty

s/ Ramona K. Petty
Notary Public
438 Bannock St.
Denver, CO 80204